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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-1413

WAYNE A. STANTON, Administrator of the Indiana State Department of Public Welfare, et al.,

Petitioners,

vs.

LOUISE BOND, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

EVELLE J. YOUNGER, Attorney General
of the State of California

JACK R. WINKLER, Chief Assistant
Attorney General - Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

GLORIA F. DeHART
Deputy Attorney General

PATRICK G. GOLDEN
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1252

Attorneys for Amicus Curiae
State of California

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INTRODUCTION

In their Supplemental Brief, respondents assert that this Court must apply the provisions of Pub. L. No. 94-559 to this case. Respondents also assert that, in light of the legislative history of the act and this Court's decision in Fitzpatrick v. Bitzer, ___ U.S. ___, 96 S.Ct. 2666 (1976), the Eleventh Amendment defense raised by the state officials must be rejected.

Amicus submits that Pub. L. No. 94-559 is inapplicable to suits brought under section 1983, since the real party in interest, the state, is not a person within the meaning of section 1983, and since the award cannot be levied against the individual state official. Amicus also submits that, even if the statute applies to states, it should not be held to apply retroactively against a state, as such a conclusion would re-

sult in an "ex post facto" modification of the Eleventh Amendment. Finally, the statute cannot, in light of due process and qualified executive immunity, be held to apply retroactively against individual state officials.

ARGUMENT

I

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUB. L. NO. 94-559) DOES NOT APPLY TO STATES OR STATE OFFICIALS IN ACTIONS BROUGHT PURSUANT TO 42 U.S.C. SECTION 1983.

In Fitzpatrick v. Bitzer, supra, this Court held that Congress, in exercising its plenary powers pursuant to section 5 of the Fourteenth Amendment, can authorize a suit against a state and, having done so, can grant a federal court the power to award attorneys' fees against a state. In so holding, the Court indicated that it need not address the question of whether or not the Eleventh Amendment bars a money judgment against a state in the absence of specific legislation.

In the instant case, respondents incorrectly presume that Pub. L. No. 94-559 applies to states. This presumption ignores the fact that there is no "threshold . . . congressional authorization" which allows a section 1983 suit to be brought against a state. Fitzpatrick v. Bitzer, supra, 96 S.Ct. at 2670. On the contrary, it is firmly established that states are not "persons" within the meaning of section 1983. Monroe v. Pape, 365 U.S. 167 (1961).

Consequently, while some Congressmen may have interpreted Pub. L. No. 94-559 to include states, the fact is that the statute contains no express or implied amendment to 42 U.S.C. section 1983 or attempt to legislatively overrule Monroe v. Pape, supra. In fact, the Report of the Senate Committee on the Judiciary, quoted on page 7 of respondent's supplemental brief,

indicates that at least some members of Congress harbored the mistaken notion that Pub. L. No. 94-559 applies to states because "defendants in these cases are often State or local bodies or State or local officials." However, the fact that state officials are often named in section 1983 suits does not alter the holding of this Court in Monroe v. Pape, supra, that states are not "persons" within the meaning of section 1983. In light of Fitzpatrick v. Bitzer, supra, the only valid method by which Congress could impose attorneys' fees against a state is to amend 42 U.S.C. section 1983 and specifically define "person" to include states. An attorneys' fees award would then be available in cases brought pursuant to section 1983 and in which a right protected by the Fourteenth Amendment is in issue. Unless and until Congress passes specific legislation which allows a state to be named a defendant in a suit involving a Fourteenth Amendment right, the Eleventh Amendment protects a state against intrusions into its treasury.

It is also clear that in injunctive suits brought pursuant to 42 U.S.C. section 1983, the state is the real party in interest. In such a case, the purpose of the action is to remedy a state practice, and not to impose a personal liability against a state official, who has both the right and duty to follow and defend state law. When a state law or procedure is alleged to conflict with a constitutional right and a federal suit is filed, the official, as an officer of the state, defends the state's interest and, as an officer of the state, will, if ordered, comply with the court order. In such a case the state is the real party in interest. The official is merely a nominal party, named by the plaintiffs because of this Court's holding in Ex Parte Young, 209 U.S. 123 (1908). To impose personal liability on a state official in such a case would violate the official's executive

immunity afforded him by this Court in Schuerer v. Rhodes, 416 U.S. 232 (1973). The official would be exposed to significant financial liability without the protection of factual allegations asserted in a complaint, a jury determination, and other due process protections afforded an official in a properly plead and proven damage suit. In order to preserve the vitality of the executive immunity and assure that states can secure the services of professional officials who can administer the state's business and make decisions without the constant threat of personal financial ruin, the statute in question cannot be interpreted to apply to state officials named as defendants in 1983 suits seeking injunctive relief.

II

ASSUMING PUBLIC LAW NO. 94-559 APPLIES TO A STATE OR STATE OFFICIAL IN AN INJUNCTIVE SUIT BROUGHT UNDER TITLE 42 UNITED STATES CODE SECTION 1893, THE STATUTE SHOULD NOT BE APPLIED RETROACTIVELY.

Citing Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), and legislature history, respondents assert that Pub. L. No. 94-559 applies to all those cases pending in a trial court or on appeal.

Amicus submits that Bradley is distinguishable from the instant case. In Bradley, this Court dealt with 20 U.S.C. section 1617, which granted authority to a federal court to award a reasonable attorneys' fee against a local educational agency, a state (or any agency thereof) or the United States (or any agency thereof) for violations of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment, as they pertain to elementary and secondary education. Because the defendant in the case was a local school board, there is no discussion of a state's Eleventh Amendment protection and the propriety of retroactively applying legislation which would have a direct fiscal

impact on a state's treasury. Consequently, respondents' reliance on Bradley ignores the fact that the State of Indiana, unlike a local school board, is protected by the Eleventh Amendment. While, pursuant to Fitzpatrick v. Bitzer, supra, the Eleventh Amendment can be modified by proper Congressional action, there is no rational basis for allocating to Congress the plenary and nonreviewable power to thwart the Eleventh Amendment retroactively. This is especially true in the instant case, in which (1) there is no specific mention that Pub. L. No. 94-559 applies to a state; (2) a state cannot be joined as a defendant under Monroe v. Pape, supra, and (3) the fiscal consequences are overwhelming.[1/] While the protection afforded the states since 1789 by the Eleventh Amendment may now, in some situations, be altered by Congress, justice demands that the states at least be given notice that significant sums will in the future have to be set aside for attorneys' fees awards.

As to the individual state official named defendant in a section 1983 suit, it is clear that retroactive application of the statute would violate the state official's qualified executive immunity (Argument I, supra) and result in a catastrophic financial injustice against an individual who was unfortunate enough to be the nominal state official named in accordance with the dictates of Ex Parte Young, 209 U.S. 123 (1968). It was just

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1. As mentioned by Senator Helms (Supplemental Brief of Respondents, 7-8), the financial consequences of statute are significant. In California alone there are several pending 42 U.S.C. section 1983 suits which include requests for attorneys' fees that may total in excess of one million dollars.

Amicus notes the anamolous situation created if this statute applies to states. Congress can now apparently authorize the raiding of state treasuries notwithstanding the Eleventh Amendment, while at the same time protecting its own coffers simply by legislative prohibition of most attorneys' awards against the federal government.

such a result which lead this Court to conclude in Bradley v. Richmond School Board, supra, 416 U.S. at 716-721 that a statute will not be applied retroactively when manifest injustice will result.

CONCLUSION

Public Law No. 94-559 does not apply to a state or state official named in an injunctive suit brought pursuant to Title 42 United States Code section 1983. The statute cannot apply to a state, because a state is not a "person" within the meaning of section 1983, and therefore there is no enabling legislation modifying the state's protection under the Eleventh Amendment. The statute cannot apply to an individual state official because the official is a nominal defendant shielded by an executive immunity.

Assuming the statute is applicable to a state or state official, it clearly cannot be held to apply retroactively, since a manifest and unconstitutional injustice would be imposed on state treasuries and/or the individual state officials named as defendants.

Consequently, the Public Law No. 94-559 does not alter the conclusion that the Eleventh Amendment bars the award of attorneys' fees in this case.

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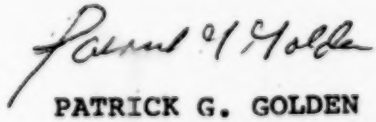
EVELLE J. YOUNGER, Attorney General
of the State of California
JACK R. WINKLER, Chief Assistant
Attorney General - Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
GLORIA F. DeHART
Deputy Attorney General



PATRICK G. GOLDEN
Deputy Attorney General

Attorneys for Amicus Curiae
State of California

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